Supreme Court, U.S.
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No. 96-1067

In The

Supreme Court of the United States

October Term, 1996

White Wing Development, Inc., a California Corporation, dba White Wing Associates,

Petitioner,

vs.

County of Solano, Board of Supervisors of the County of Solano, Planning Commission of the County of Solano,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court should grant certiorari to determine if a 15-year-old county land-use regulation, which mandates that all rural residential development dispose of household wastewater through individual septic systems, effected a facial regulatory taking of petitioner's subsequently acquired property rights, when the state courts below concluded that they were jurisdictionally timebarred under state law from deciding this constitutional issue.

2. Whether this Court should grant certiorari to determine if a landowner's claim that a 15-year-old regulation effected a facial taking is still ripe for adjudication despite the expiration of the applicable state law statute of limitations.

3. Whether this Court should grant certiorari to reconsider if the constitutional doctrine of separation of powers prevents a court from ordering a local legislative body to enact a proposed land-use regulation.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

I. STATEMENT OF THE CASE

In this case, Petitioner challenges two separate legislative actions taken by Respondent COUNTY OF SOLANO ("County"), through its Board of Supervisors. The first challenged action is the County's enactment of a land-use regulation in 1980; the second is the County's denial of Petitioner's proposed amendments to that regulation in 1995. The state courts below applied well-established rules of law and denied Petitioner's request for judicial relief. As to the County's enactment of the land-use regulation, the courts held that a *facial* challenge alleging a regulatory taking must be brought within the relevant statute of limitations. As to the County's denial of Petitioner's proposed legislation in 1995, the courts held that, while a court may adjudicate the constitutionality of legislative enactments, it may not order a legislative body to enact proposed legislation.

A. Facts Material to the Questions Presented

Solano County is situated northeast of San Francisco Bay; the western quarter of the county extends into the foothills of California's Coast Range, while the eastern portion is part of the Central Valley. Due to this geography, the predominant land use in the western unincorporated areas of the county is low density suburban homes, locally referred to as Rural Residential development, while most of the eastern areas of the county are devoted to agriculture.

In 1980, the County adopted the Land Use and Circulation Element ("LUCE") of the Solano County General Plan. This planning document includes various land-use policies and regulation, two of which are material to this case. First, the LUCE designates approximately 14,000 acres, primarily in the western non-agricultural portion of the county, for Rural Residential development, i.e., one dwelling unit per 2.5 to 10 acres. Second, all new development throughout the unincorporated areas of the county must use on-site sewage disposal systems. This sewage disposal policy is the crux of this litigation, and will be referred to hereinafter as the "septic system requirement." The stated legislative purpose for this septic system requirement was to confine new development requiring public sewer service to areas within incorporated cities.

In the early 1990's, Petitioner purchased 1220 acres of undeveloped Rural Residential land in the northwestern portion of the county.[1] Petitioner was fully aware of the County's septic system requirement at the time it

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[1] Petitioner's ultimate objective for the property was to develop an up-scale community with approximately 600 homes in several development clusters surrounding a golf course and club house. It is undisputed that a development project with this design and intensity would require that the houses be connected to a public sewage treatment system rather than utilize individual septic systems. It is commonly assumed that, because of geologic and soil conditions, Petitioner's 1220-acre property could safely accommodate between 300 and 400 individual household septic systems. In its petition for writ of certiorari, Petitioner does not contend that the County's septic system requirement deprives it of all economically beneficial or productive use of its property.

acquired the property. Petitioner's predecessor in interest had filed an application for a general plan amendment that would have exempted the 1220-acre property from the septic system requirement, and the application was still pending when Petitioner acquired the property. The proposed general plan amendment was eventually considered and denied by the Board of Supervisors at a public hearing on July 5, 1995. (Petitioner's Appendix E.)

B. Manner In Which the State Courts Passed on the Federal Questions

Petitioner filed an action in the Superior Court challenging the County's denial of the proposed general plan amendment. (Petitioner's Appendix D.) Petitioner argued that the County's denial of the legislative proposal was an abuse of legislative discretion (first cause of action), a violation of Petitioner's substantive due process right to be free from an uncompensated taking (third cause of action), and an inverse condemnation of Petitioner's property for which compensation was required (fourth cause of action).[2] On these causes of action, Petitioner prayed for a judicial writ directing the County to enact the proposed legislation and for an award of damages and compensation. (Petitioner's Appendix D, p. 30, ¶¶ 1, 3 & 4.)

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[2] It is not entirely clear whether Petitioner's third and fourth causes of action are directed at the County's 1995 decision to deny the proposed general plan amendments, or at the county-wide septic system requirement enacted in 1980. This ambiguity continues on in the petition for writ of certiorari.

In its second cause of action, Petitioner argued that the County's septic system requirement, enacted in 1980, was facially unconstitutional because it did not substantially advance a legitimate state interest; Petitioners asked the court to issue a judicial declaration to this effect. (Petitioner's Appendix D, p. 30, ¶ 2.)

The County demurred to all causes of action. As to the causes of action contesting the County's 1995 denial of Petitioner's proposed general plan amendment, the County argued that a local legislative body's decision not to enact proposed legislation was not subject to judicial review under the separation of powers doctrine. To the extent that Petitioner's substantive due process and inverse condemnation claims were predicated upon the County's decision not to enact the proposed legislation, such claims were also barred by the doctrine. As to the cause(s) of action contesting the County's 1980 enactment of the septic system requirement, the County argued that such claims were timebarred by a 120-day statute of limitations imposed by state law.

The Superior Court sustained the County's demurrer, without leave to amend, and entered a judgment dismissing the action. (Petitioner's Appendix C.) The Superior Court concluded that the Petitioner was asking the court to perform a legislative function, which the court could not do, due to the constitutional doctrine of separation of powers. Implicit in the Superior Court's decision sustaining the demurrer is its conclusion that Petitioner's challenge to the County's 1980 enactment of the septic system requirement was timebarred under the relevant statute of limitations.

Petitioner appealed, on all causes of action, to California's Court of Appeal, First Appellate District. On appeal, both sides raised the same issues and arguments that had been raised in the Superior Court. In an unpublished decision (Petitioner's Appendix A), the Court of Appeal affirmed the Superior Court's judgement. The Court of Appeal held that Petitioner's challenges to the County's 1995 denial of the proposed general plan amendment "improperly sought to compel performance of a legislative act involving a policy determination and the exercise of discretion." (Petitioner's Appendix A, p. 9.) As to Petitioner's constitutional claims, the Court of Appeal held:

> Plaintiff specifically sought a declaration that all provisions of the County's general plan mandating the use of septic sewage disposal and disallowing use of central wastewater treatment facilities are contrary to public health, safety, and welfare, do not substantially advance a legitimate state interest, are invalid as purported exercises of the police power, and are therefore void. This attack on the general plan and its elements is clearly timebarred.

(Petitioner's Appendix A, pp. 11 – 12.)

In dicta, the Court of Appeal commented that the County's 1995 decision not to amend its general plan was not an abuse of legislative discretion:

> The Solano County General Plan also seeks to channel new development and growth toward already developed areas. A 'cornerstone principle' of the plan is the direction of new urban development and growth toward municipal areas. To foster that policy, the general plan

> confines new development requiring public sewer service to areas located in incorporated cities. Rural development in unincorporated areas must rely on individual on-site sewage treatment systems, and that development is limited to the carrying capacity of the land. While we cannot say whether this policy is the best for the County, nor can we say it is irrational or arbitrary or an abuse of discretion.

(Petitioner's Appendix A, pp. 9-10.)

Petitioner timely filed a petition for discretionary review with the California Supreme Court. The state Supreme Court denied the petition on October 16, 1996. (Petitioner's Appendix B.)

C. Correction of Misstatements in the Petition

Throughout this litigation, many of Petitioner's claims and arguments have been vague as to whether they were directed against the County's 1995 decision not to amend the general plan, or against the land-use regulation enacted in 1980. In essence, Petitioner has tried to argue that the County's 1995 decision *not to enact* a special sewage disposal regulation for its property was equivalent to *re-enacting* the 1980 county-wide regulation, thereby commencing a new statute of limitations for testing the *facial* constitutionality of that 15-year-old regulation. This vagueness continues in the petition for writ of certiorari, and colors the questions presented for review by Petitioner.

The County's 1995 decision must be seen for what it was and nothing more. It was *not* a consideration of all

possible regulatory options related to sewage disposal, followed by the enactment of a comprehensive regulatory scheme that the County had determined would best protect public health, safety and welfare. Rather, it was simply a decision that Petitioner's proposed special exemption for its own property was not an appropriate amendment to the existing regulatory system.

In its statement of the case, Petitioner fails to mention that the statute of limitations was a fundamental issue in this litigation, and was in fact the basis on which the Court of Appeal held that it could not address the facial constitutionality of the County's septic system requirement. As a result, the courts below have not directly addressed whether a county-wide septic system requirement constitutes a regulatory taking, but have instead concluded that they were jurisdictionally timebarred under California law from deciding the constitutional issue in this case.

II. REASONS FOR DENYING THE WRIT

A. The State Courts Below Declined to Address Petitioner's Constitutional Takings Claims, Ruling That Such Claims Were Timebarred by California's Statute of Limitations

At the time that Petitioner commenced this action, California law required that any action "to attack, review, set aside, void or annul the decision of a legislative body to adopt or amend a general plan" be commenced and

served within 120 days after the legislative body's decision. *See* CAL. GOV'T CODE, § 65009, subd. (c)(1), (Deering Supp. 1997).[3]

California courts have held that any challenge to the *facial* validity of a land-use regulation is subject to this statute of limitations. *Hensler v. City of Glendale*, 8 Cal.4th 1, 22, 876 P.2d 1043, 32 Cal.Rptr. 244 (1994). This is so regardless of whether the requested remedy is declaratory relief, money damages or inverse condemnation. *Freeman v. City of Beverly Hills*, 27 Cal.App.4th 892, 896-897, 32 Cal.Rptr. 731 (1994).[4]

In this case, the state courts below properly recognized that Petitioner's constitutional claim of regulatory taking was a *facial* challenge to the septic system requirement which the County had enacted in 1980, rather than an attack on the County's 1995 decision not to amend that

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[3] This subdivision was amended, effective January 1, 1996, to shorten the statute of limitations to 90 days. (1995 Cal. Stat. ch. 253, § 1.)

[4] The Ninth Circuit has held that the limitations period for a civil rights action in California brought under 42 U.S.C. § 1983, based on the enactment of an ordinance, is one year from the date of enactment; in addition, if the ordinance is subsequently amended, a new claim does not accrue unless the amendment substantively impacts the claimant. *De Anza Properties X, Ltd. v. County of Santa Cruz*, 936 F.2d 1084, 1085-1086 (9th Cir. 1991). This one year statute of limitations applies to all federally based claims of unjust taking. *Azul-Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704, 705 (9th Cir. 1992) (*Azul II*), *cert. denied*, 506 U.S. 1081 (1993). To the extent there might be an eight or nine month discrepancy between the statutes of limitations for bringing state and federal constitutional claims, this case is not the proper vehicle for addressing such a possible conflict.

pre-existing regulation. Applying the statute of limitations described above, the state courts concluded that they were jurisdictionally timebarred from deciding whether the County's septic system requirement constituted a regulatory taking of Petitioner's property rights.[5]

The Court has expressed a strong disinclination to consider any claims that were not addressed below by the state courts which heard a case. *Yee v. Escondido*, 503 U.S. 519, 533 (1992) (citing *Illinois v. Gates*, 462 U.S. 213, 218-220 (1983)). The Court's cautionary observations in *Yee* are equally applicable to this case:

> Prudence . . . dictates awaiting a case in which the issue was fully litigated below, so that we will have the benefit of developed arguments on both sides and lower court opinions squarely addressing the question. . . . In fact, were we to

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[5] In dicta, the Court of Appeal commented that the County's septic system requirement was not an irrational method for directing new development toward existing urban areas, and analogized the County's regulation to an initiative that was upheld by the California Supreme Court in *De Vita v. County of Napa*, 9 Cal.4th 763, 792, 889 P.2d 1019, 38 Cal.Rptr. 699 (1995). (Petitioner's Appendix A, pp. 9-10.) In *De Vita*, 9 Cal.4th at 792, the California Supreme Court stated that a land-use regulation which directed future development toward existing urban areas was consistent with the basic purposes of local land-use planning. However, the fact that the Court of Appeal included this dictum in its unpublished opinion is not a sufficient reason for the Court to grant certiorari, because an intermediate appellate courts' dictum which agrees with a state supreme court's reasoning is not the equivalent of "a state court of last resort [deciding] an important federal question in a way that conflicts with the decisions of another state court of last resort or of a United States court of appeal." *See* Sup. Ct. R. 10(b).

> address the issue here, we would apparently be the first court in the Nation to determine whether an ordinance like this one effects a regulatory taking. . . . We leave the regulatory taking issue for the California courts to address in the first instance.

Id., 503 U.S., at 538.

Because the state courts hearing this case declined to address Petitioner's constitutional takings claims, leaving that issue unlitigated below, a grant of certiorari is not appropriate here.

B. It is Well Established That the *Facial* Constitutionality of a Land-use Regulation Is Ripe for Adjudication as Soon as the Regulation Is Enacted

Petitioner's ripeness argument is not entirely clear. In its second question presented for review, Petitioner seems to be asking the Court to decide whether a property owner's unsuccessful attempt to amend a 15-year-old regulation renders the *facial* constitutionality of that regulation ripe for adjudication. However, at page 21 of its petition for writ of certiorari, Petitioner states, "The ripeness doctrine has no application to the issue that White Wing brings to this Court." With this unequivocal declaration, Petitioner appears to be admitting that its second question presented for review does not justify certiorari.

Nevertheless, the ripeness issue deserves brief comment. In *Yee*, the Court explained that a *facial* challenge which alleges that an ordinance does not substantially advance a legitimate state interest is ripe for adjudication

as soon as the ordinance is enacted. *Yee v. Escondido*, 503 U.S. at 534. Therefore, the *facial* constitutionality of the County's septic system requirement was ripe for adjudication as soon as that regulation was enacted in 1980.

However, once a claim becomes ripe, it will not remain so indefinitely; even a legitimate claim will become "stale" if not properly asserted within a reasonable period of time. A legislatively established statute of limitations defines the period of time that is deemed to be "reasonable" in any particular situation. Statutory limitation periods are based on the theory that, through the passage of time, the right to be free of stale claims comes to prevail over the right to prosecute them. *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944).

Petitioner's novel theory seems to be that stale claims are "refreshed" and made justiciable once again whenever a legislative body declines to amend an allegedly unconstitutional regulation. In other words, anyone can purchase an exemption to the statute of limitations simply by drafting a legislative amendment and paying the required application fee. Petitioner has failed to cite any legal authority to support this theory.

The statute of limitation has always presented an absolute barrier to any claimant who "has slept on his rights."[6] With its petition for writ of certiorari, Petitioner

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[6] In *Burnett v. New York Central R. Co.*, 380 U.S. 424, 428 (1965), the Court identified various objectives which are served by statutes of limitations, and commented, "Moreover, the courts ought to be relieved of trying stale claims when a plaintiff has slept on his rights."

is recommending that the Court consider installing a toll gate through that otherwise impenetrable barrier. Petitioner's suggestion does not warrant serious consideration.

C. It is Well Established That the Separation of Powers Doctrine Does Not Prevent a Court From Adjudicating the Constitutionality of Legislation in Response To a Timely Challenge

Contrary to Petitioner's implication, the state courts below did not invoke the separation of powers doctrine to avoid constitutional review of the County's 1980 septic system requirement. Rather, the courts below concluded that the statute of limitations left them without jurisdiction to adjudicate a *facial* takings claim aimed at that 15-year-old regulation.

The Court of Appeal's opinion clearly indicates that the separation of powers doctrine acted as a bar only to Petitioner's attack on the County's 1995 *denial* of the proposed general plan amendment.[7] The Court of Appeals explained that the doctrine prevented a court from ordering a legislative body to enact a legislative proposal, except where the body lacked discretion to do otherwise. (Petitioner's Appendix A, pp. 5-6.) The Court of Appeal held that the County's 1995 decision whether to enact Petitioner's proposed general plan amendment was "a legislative act involving a policy determination

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[7] Obviously, if the County had decided to *enact* Petitioner's proposed general plan amendment, the separation of powers doctrine would not have prevented a court from reviewing the constitutionality of that newly-enacted legislative amendment.

and the exercise of discretion." (Petitioner's Appendix A, p. 9.)

Petitioner's third question presented for review relies on at least two assumptions:[8] first, that the County's septic system requirement effected a compensable taking of property rights upon its enactment; second, that Petitioner sought to test the constitutionality of the regulation in a timely manner. Petitioner's question should be rephrased to state these assumptions explicitly, as follows: "Supposing that the County's regulation effected a *facial* taking of a protectable property interest, does the separation of powers doctrine prevent a court from granting an affected landowner effective relief when such relief is sought in a timely manner?"

The Court answered this question a decade ago when it explained, "Once a court determines that a taking has occurred, the government retains the whole range of options already available – amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain." *First Lutheran Church v. Los Angeles County*, 482 U.S. 304, 321 (1987). In other words, the separation of powers doctrine does not prevent a court from ordering a legislative body to take corrective action, but that doctrine does prevent a court from limiting a legislative body's discretion to choose from among three equally acceptable alternatives. Certiorari in this case is not warranted because Petitioner has offered no reason

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[8] Petitioner's third question also assumes that Petitioner is an affected landowner who has standing to challenge the 1980 enactment. The complete lack of any factual support for this assumption is discussed under heading II.D., below.

why the Court should reconsider its language in *First Lutheran*.

D. Petitioner Has Failed to Identify Any Protectable Property Interest That Has Been Adversely Affected by the County's Actions

If the statute of limitations had not presented such a decisive barrier to Petitioner's constitutional claim,[9] Petitioner would not have been able to demonstrate standing to assert that claim because Petitioner did not acquire its property until long after the alleged "taking" occurred. Even if the County's 1980 enactment of the septic system requirement "took" a protectable property right from all landowners whose properties became subject to that county-wide regulation, and thereby reduced the value of all such properties, Petitioner could not have suffered any injury as a result. When Petitioner purchased the 1220-acre property in the early 1990's, the fair market value of the property would have reflected the development restrictions in place at that time.

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Court stated that compensation was not required when the property interest allegedly "taken" by a regulation was not part of the landowner's title to begin with. *Id.*, 505 U.S. at 1027.

> This accords, we think, with our "takings" jurisprudence, which has traditionally been guided

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[9] For example, suppose for the sake of argument that California law imposed a 15-year statute of limitations for commencing general plan challenges.

> by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures *newly enacted* by the State in the legitimate exercise of its police powers. . . .
>
> . . . Any limitation [that prohibits all economically beneficial use of land] cannot be *newly legislated or decreed* (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership.

Id., 505 U.S. at 1027-1029 [emphasis added].

Nor has Petitioner alleged facts sufficient to show that it had standing to assert a constitutional takings claim based on the County's 1995 denial of its proposed general plan amendment. Even if *existing* septic systems are causing water pollution problems in the vicinity of Petitioner's property, Petitioner has failed to explain how its proposed legislation could have improved that *existing* situation. Petitioner seems to argue that its proposed regulatory amendment would have reduced the possibility that Petitioner might create *new* water pollution problems on its own property. However, it is undisputed that Petitioner continues to have the right, and the obligation, to design, construct and maintain non-polluting septic systems in conjunction with any development on its

property. The County's action in 1995 did not take anything away from the bundle of property rights that Petitioner acquired when it purchased the property.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

DATED: April 9, 1997

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